BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion Below.

The opinion of the United States Court of Appeals for the Eighth Circuit is not yet officially reported, but is set out on pages 136-144 of the Record. The opinion or order of the District Court of the United States for the District of Nebraska was not officially reported, but is set out on pages 118-122 of the Record.

II.

Jurisdiction.

A concise statement of the grounds on which the jurisdiction of this court is invoked appears under the headings C and D in the petition for certiorari, *ante,* and in the interest of brevity is not repeated here.

III.

Statement.

A concise statement of the case containing all that is material to the consideration of the questions presented, including a summary of the questions presented is set out under headings A and B of the petition for certiorari, *ante,* and in the interest of brevity is not repeated here.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In affirming the District Court's order, entered on May 13, 1942, and filed May 29, 1942, retroactively beginning the three-year stay order, provided under paragraph 2 of Section 75(s) of the Bankruptcy Act, on March 22, 1940, the date the appraisal was filed.

(2) In affirming the District Court's order, entered May 13, 1942, automatically beginning the three-year stay period on March 22, 1940, without a judgment order on that date and without first finding in said order all of the conditions set forth in Section 75(s) (1) of the Bankruptcy Act.

(3) In failing to consider all the facts in the case which clearly reflect that the District Court's attention was directed, at the hearing held May 13, 1942, to the fact that the petitioner contended that the three-year period began at the date of the court's order and not at the date the appraisal was filed.

(4) In holding that the debtor petitioner cannot collaterally attack or maintain an appeal from the judgment or order of the District Court.

(5) In holding that the debtor petitioner waived his right to appeal by his motion dated February 17, 1942, and refusing to pass on whether or not the proper and orderly procedure was followed by the District Court, as provided under Section 75(s) of the Bankruptcy Act.

(6) In holding that rentals began on the property involved on March 22, 1940, instead of May 13, 1942, the date District Court's order was entered.

V.

Points and Authorities.

1.

The District Court had no power to give retroactive effect to its order of May 29, 1942, and start the running of the three-year stay period on March 22, 1940.

Borchard v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 1225, 60 S. Ct. 957;
Section 75(s) of the Bankruptcy Act, (11 U. S. C. A., Sec. 203[s]);
Paradise Land & Livestock Co. v. *Federal Land Bank,* 10 Cir., 118 F. (2d) 215, 217;
Hardt v. *Kirkpatrick,* 9 Cir., 91 F. (2d) 875, 878, Cert. denied 303 U. S. 626, 58 S. Ct. 762, 82 L. Ed. 1088;
Bernards v. *Johnson,* 9 Cir., 103 F. (2d) 567, 571, affirmed 313 U. S. 537, 85 L. Ed. 1507.

2.

The District Court had no power to begin the three-year stay period without first finding that all the conditions set forth in the statute had been complied with.

Section 75(s)(2) of the Bankruptcy Act (11 U. S. C. A., Sec. 203[s][2]);
Hardt v. *Kirkpatrick,* 9 Cir., 91 F. (2d) 875;
Bernards v. *Johnson,* 9 Cir., 103 F. (2d) 567;
Paradise Land & Livestock Co. v. *Federal Land Bank,* 10 Cir., 118 F. (2d) 215.

3.

In considering all the facts in this case the petitioner can maintain an appeal to reverse, modify, or review the judgment or order of the District Court.

Wear v. *Imperial Window Glass Co.,* 8 Cir., 224 Fed. 60, 63.
In re Bicknell, 48 F. Supp. 895.

4.

The petitioner can collaterally attack at any time the void judgment or order of the District Court.

Section 75(s)(1)(2) of the Bankruptcy Act (11 U. S. C. A., Sec. 203[s][1][2]);
Electrical Corp. v. *Thomas & Betts Co.,* 307 U. S. 241, 242, 83 L. Ed. 1263, 50 S. Ct. 860;
Fishel v. *Kite,* (D. C.) 101 F. (2d) 685, 687;
Windsor v. *McVeigh,* 93 U. S. 274, 282, 23 L. Ed. 914, 917;
Hovey v. *Elliott,* 167 U. S. 409, 446, 42 L. Ed. 215, 231, 17 S. Ct. 841;
Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861;
Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872;
People ex rel. v. *Burke,* 72 Col. 486, 502, 212 Pac. 837, 843, 30 A. L. R. 1085, 1096;
Note 39 L. R. A. 449.

5.

It is the duty of the appellate courts to determine whether or not an orderly and proper procedure was followed by the District Court and the debtor petitioner cannot waive the proper procedure to be complied with under the law.

John Hancock Mut. Life Ins. Co. v. *Bartels,* 308 U. S. 180, 84 L. Ed. 186, 60 S. Ct. 221;

Wright v. *Union Central Life Ins. Co.,* 311 U. S. 273, 85 L. Ed. 184, 61 S. Ct. 196;
Borchard v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 1225, 60 S. Ct. 957;
Section 75(s) of the Bankruptcy Act (11 U. S. C. A., Sec. 203[s]).

6.

Payment of rentals begin on the date the court entered its order staying proceeding and not before.

Section 75(s)(2) of the Bankruptcy Act (11 U. S. C. A., Section 203[s][2]);
Binns v. *Lawrence,* 53 U. S. 9, 13 L. Ed. 871, 12 How. 9;
U. S. v. *Stewart,* 61 S. Ct. 102, 311 U. S. 60, 85 L. Ed. 40;
Helvering v. *Hammell,* 61 S. Ct. 368, 311 U. S. 504, 85 L. Ed. 303.

VI.

ARGUMENT.

1.

The District Court had no power to give retroactive effect to its order filed May 29, 1942, and start the running of the three-year stay period on March 22, 1940.

This court, in the case of *Borchard* v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 1225, 60 S. Ct. 957, held that the scheme of the provisions of Section 75(s) of the Bankruptcy Act "is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer debtor" and "that orderly procedure includes * * * the entry of a stay which will assure him of his possession for three years from the date of the order." The court's order in this case was entered on May 13, 1942, and filed May 29, 1942, and under the decision of this court, the District Court, affirmed by the Circuit Court of Appeals, had no power to begin the stay order on March 22, 1940.

The stay provided for in paragraph 2 of Section 75(s) is not an automatic stay, but a judicial one. *Paradise Land & Livestock Co.* v. *Federal Land Bank,* (10 Cir.) 118 F. (2d) 215, 217; *Hardt* v. *Kirkpatrick,* (9 Cir.) 91 F. (2d) 875, 878; and *Bernards* v. *Johnson,* (9 Cir.) 103 F. (2d) 567, 571, affirmed 313 U. S. 537, 85 L. Ed. 1507. In *Paradise Land & Livestock Co.* v. *Federal Land Bank, supra,* the District Court, in its order of August 7, 1940, retroactively began the three-year stay period as of September 8, 1938. The Tenth Circuit Court of Appeals in its opinion (l. c. 218) said:

> "We are of the opinion that the court was without power to give retroactive effect to its order of August 7, 1940, and start the running of the three-year stay period as of September 8, 1940."

Clearly, the District Court in the case at bar had no power to give retroactive effect to its order entered on May 13, 1942, and filed May 29, 1942; and start the running of the stay period on March 22, 1940. Having no power to make such an order under the statute, its judgment or order is, therefore, void.

2.

The District Court had no power to begin the three-year stay period without first finding that all the conditions set forth in the statute had been complied with.

Paragraph 2 of Section 75(s) of the Bankruptcy Act provides in part:

> "* * * when the conditions set forth in this section have been complied with the court shall stay all judicial or official proceeding in any court, * * * for a period of three years."

The conditions that have to be complied with are an appraisal, approval of the appraisal by the referee, and orders of the referee as provided in paragraph 1 of Section 75(s) of the Bankruptcy Act.

The Tenth Circuit Court of Appeals and Ninth Circuit Court of Appeals have held in the following cases in construing this section of the Bankruptcy Act that "the stay provided for is not an automatic stay but a judicial one, to be granted only upon a finding that the conditions set forth in the section have been complied with." *Hardt*

v. *Kirkpatrick, supra; Bernards* v. *Johnson, supra;* and *Paradise Land & Livestock Co.* v. *Federal Land Bank, supra.*

The District Court, in its order dated May 29, 1942 (R. 118-122), made a finding that an appraisal was made but makes no findings that the appraisal was approved by the referee or that the conditions set out in paragraph 1 of Section 75(s) have been complied with. The reason for doing so is that no orders were made by the referee after the appraisal was filed on March 22, 1940, as provided for in this paragraph and section. The District Court's order and judgment beginning the stay period prior to the date of its order (R. 118-122), without stating that all of the conditions set forth in the statute have been complied with, is, therefore void, because it had no power to make an order setting the three-year stay period without finding the conditions prescribed under the statute.

3.

In considering all the facts in this case the petitioner can maintain an appeal to reverse, modify, or review the judgment or order of the District Court.

The Circuit Court of Appeals refused to decide the question whether the District Court erred in its order entered on May 13, 1942, and filed May 29, 1942, by applying the rule that one who secures by a judgment order or decree all of the relief he seeks or one who complains of error for which he himself is responsible cannot maintain an appeal to reverse or modify or review the proceedings on which such judgment is founded.

The court based its decision on the fact that the debtor in objecting to the appellee's motion to end the three-year

stay period on October 27, 1941 (the District Court first began the three-year stay period without an appraisal being made on October 27, 1938 [R. 36]), asserted in his motion filed on his own behalf, on February 17, 1942 (R. 114), that the three-year stay period began on March 22, 1940, the date of filing of the appraisal.

The court below, in rendering its decision, failed to consider that on March 9, 1942, new counsel entered his appearance on behalf of the debtor (R. 115); that the District Court ordered on April 21, 1942, a further showing and argument on the date or dates the stay order commenced (R. 117); that said counsel of the debtor argued on May 13, 1942, the date of the hearing, that the stay period began on the date of the court's order (R. 148, 149); and that the District Court was fully apprised of said counsel's and debtor's position at the date of the hearing on May 13, 1942, because eight days before the District Court filed his written order on May 29, 1942, the debtor filed a notice of appeal on May 21, 1942, which specially shows that the debtor's position before the District Court was that the three-year stay order should begin on the date the court entered its order and not on the date the appraisal was filed (R. 123).

One of the cases cited by the Circuit Court of Appeals as authority that the petitioner can not maintain an appeal is *Wear* v. *Imperial Window Glass Co.*, 8 Cir., 224 Fed. 60, 63. This decision also holds that if the specific error is pointed out to the trial court the appellate court must review such ruling. As stated, the petitioner did point out specific error to the District Court eight days before the written order of the District Court was filed. Further, the District Court believed it had power to give retroactive effect to its order entered May 13, 1942, and filed May 29, 1942. See *In re Bicknell*, 48 F. Supp. 895,

rendered by Judge Delehant, the district judge who entered the order appealed from in the case at bar.

Taking these facts in consideration, it is clear that the debtor did not appeal from a judgment in his own favor and that the Court of Appeals erred in not deciding the case on its merits.

4.

The petitioner can collaterally attack at any time the void judgment or order of the District Court.

Assuming, but not conceding, that the petitioner appealed from a judgment in his own favor, the petitioner, nevertheless, had the right collaterally to attack this judgment in the Circuit Court of Appeals. The cases the Circuit Court of Appeals cites (R. 141, 142) to support its ruling that the petitioner could not maintain an appeal in that court are all based upon the fact that the District Court had jurisdiction or power to enter its judgment and therefore the refusal of the appellate court to entertain the appeal left a valid judgment in the District Court. One, *Electrical Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, 242, 83 L. Ed. 1263, 50 S. Ct. 860, granted certiorari because of a conflict of decisions and then, after stating the general rule, reversed the Court of Appeals and this court held that it had jurisdiction to direct the reformation of the decree.

In the case at bar the District Court, as heretofore shown, under the Bankruptcy Act, Section 75(s)(1)(2), had no power retroactively to begin the three-year stay period on March 22, 1940, or enter its order without finding that the conditions set forth in said section had been complied with, and as a result its judgment or order is void and can be attacked collaterally at any time. *Fishel*

v. *Kite,* (Dist. of Col.) 101 F. (2d) 685, 687. This is true even though the court had jurisdiction of the parties in subject matter. *Windsor* v. *McVeigh,* 93 U. S. 274, 282, 23 L. Ed. 914, 917; *Hovey* v. *Elliott,* 167 U. S. 409, 446, 42 L. Ed. 215, 231, 17 S. Ct. 841; *Ex parte Rowland,* 104 U. S. 604, 26 L. Ed. 861; *Ex parte Lange,* 18 Wall. 163, 21 L. Ed. 872; and *People ex rel. Burke,* 72 Col. 486, 502, 212 Pac. 837, 843, 30 A. L. R. 1085, 1096. See, also, Note 39 L. R. A. 449. The above cases are all in direct conflict with the Courts of Appeals' decision, holding that the District Court's decision could not be attacked in that court.

5.

It is the duty of the appellate courts to determine whether or not an orderly and proper procedure was followed by the District Court and the debtor petitioner cannot waive the proper procedure to be complied with under the law.

The Circuit Court of Appeals has in effect held that the petitioner by filing the motion dated February 17, 1940 (R. 114), has waived his rights under Section 75(s) of the Bankruptcy Act. There is no provision in the Bankruptcy Act which provides that a debtor can waive his rights and such ruling is clearly against public policy.

The duty of the appellate courts under these provisions of the Bankruptcy Act is to determine whether or not an orderly and proper procedure was followed by the District Court. This court, in the cases of *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 84 L. Ed. 186, 60 S. Ct. 221; *Wright* v. *Union Central Life Ins. Co.,* 311 U. S. 273, 85 L. Ed. 184, 61 S. Ct. 196; and *Borchard* v. *California Bank, supra,* has determined that on the facts in each case an orderly procedure was not followed under

the provisions of this statute. Clearly it is the duty, and this court, as well as the Court of Appeals, has jurisdiction to determine whether or not an orderly and proper procedure, as set out in Section 75(s) of the Bankruptcy Act, was followed in this case. Having such a duty, the petitioner debtor cannot waive the correct procedure to be followed by the courts under the law.

6.

Payment of rentals began on the date the court entered its order staying proceeding and not before.

The court below began rentals on March 20, 1940, and this ruling is in direct conflict with that part of Section 75(s)(2) of the Bankruptcy Act (11 U. S. C. A. § 203[s][2]), which states that "The first payment of such rental shall be made within one year *of the date of the order* staying proceedings."

The order staying proceedings was entered on May 13, 1942, and filed May 29, 1942. To support its ruling, the Circuit Court of Appeals stated that this portion of the statute should read (R. 142): Within one year of "the effective date of the order staying proceedings." As the words in the statute are stated in plain and unequivocal terms, the Circuit Court of Appeals has no power to attempt to modify the language in the statute. *Binns* v. *Lawrence,* 53 U. S. 9, 13 L. Ed. 871, 12 How. 9; *U. S.* v. *Stewart,* 61 S. Ct. 102, 311 U. S. 60, 85 L. Ed. 40; *Helvering* v. *Hammell,* 61 S. Ct. 368, 311 U. S. 504, 85 L. Ed. 303. The decision of the Court of Appeals, therefore, is in direct conflict with these decisions of this court.

Conclusion.

For the reasons set forth in the petition and supported by the argument and authorities cited in this brief, we respectfully submit that this case is one calling for the exercise by this court of its supervisory powers in order that the various conflicts and errors herein pointed out may be corrected, and to that end we strongly urge the petition for a writ of certiorari be granted.

Respectfully submitted,

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